No. 14767

IN THE

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

HAROLD KENNEDY, *Appellee*

On Appeal from the United States District Court for the Western District of Washington, Northern Division

---

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General,

CHARLES P. MORIARTY,
United States Attorney,

PAUL A. SWEENEY,
JULIAN H. SINGMAN,
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

Page

Argument 1

1. Respondeat superior principles under Washington law are no different from those under federal law 2

2. The facts of this case do not meet the requirements of the Washington law of respondeat superior for imposing liability upon the United States 3

Conclusion 9

CITATIONS

CASES:

Bourus v. *Hagen*, 192 Wash. 588, 74 P. 2d 205 (1937) 5, 7
Buckley v. *Harkins*, 114 Wash. 468, 167 Pac. 928 (1921) 5
Burchfield v. *Department of Labor and Industries*, 165 Wash. 106, 4 P. 2d 858 (1931) 4
Carmin v. *Port of Seattle*, 10 Wash. 2d 139, 116 P. 2d 338 (1941) ... 5
Carter v. *Dep't of Labor and Industries*, 183 Wash. 86, 48 P. 2d 623 (1935) 6
Dahl v. *Moore*, 161 Wash. 503, 297 Pac. 218 (1931) 5
Femling v. *Star Publishing Co.*, 195 Wash. 395, 81 P. 2d 293 (1938) .. 5
Hilding v. *Department of Labor and Industries*, 162 Wash. 168, 298 Pac. 321 (1931) 5
James v. *Ellis*, 44 Wash. 2d 599, 269 P. 2d 573 (1954) 5
Kludas v. *Island-American Printing Co.*, 149 Wash. 180, 270 Pac. 429 (1928) 6
Leech v. *Sultan R. & Timber Co.*, 161 Wash. 426, 297 Pac. 203 (1931) .. 3
McGrail v. *Department of Labor and Industries*, 190 Wash. 272, 67 P. 2d 851 (1937) 3
Melosevich v. *Cichy*, 30 Wash. 2d 702, 193 P. 2d 342 (1948) 6
Morris v. *Department of Labor and Industries*, 179 Wash. 423, 38 P. 2d 395 (1934) 6
Nettleship v. *Shipman*, 161 Wash. 292, 296 Pac. 1056 (1931) 9
N.L.R.B. v. *Hearst Publications*, 322 U.S. 111 (1944) 5
Rice v. *Garl*, 2 Wash. 2d 403, 98 P. 2d 301 (1940) 4
Roletto v. *Department Stores Garage*, 30 Wash. 2d 439, 191 P. 2d 875 (1948) 2, 7
Thompson v. *Department of Labor and Industries*, 192 Wash. 501, 73 P. 2d 1320 (1937) 6
Williams v. *United States*, 24 U.S. Law Week 3107 (Oct. 17, 1955) .. 1
Wilson v. *Times Printing Co.*, 158 Wash. 95, 290 Pac. 691 (1930) .. 6

IN THE

United States Court of Appeals For the Ninth Circuit

No. 14767

UNITED STATES OF AMERICA, *Appellant*

v.

HAROLD KENNEDY, *Appellee*

On Appeal from the United States District Court for the Western District of Washington, Northern Division

REPLY BRIEF FOR APPELLANT

ARGUMENT

The decision of the United States Supreme Court in *Williams* v. *United States,* 24 U.S. Law Week 3107 (Oct. 17, 1955) has shed new light on the issues posed in this case and has made advisable some comment on, and analysis of, appellee's answering brief. The Supreme Court remanded the *Williams* case for reconsideration and application of the governing principle that state law of *respondeat superior* is controlling. Thus the effect of that decision is to affirm the contention made in Point II of our main brief that the only standard for liability under the Federal Tort Claims Act is that of *respondeat superior;* "line of

duty'' considerations are irrelevant. It also makes clear, contrary to our contention in Point I, that the law of Washington State, rather than federal law, controls the application of that *respondeat superior* doctrine. Hence we shall here elaborate on the statement in our main brief that even if Washington law were applicable the judgment below should be reversed.

1. Respondeat Superior Principles Under Washington Law Are No Different From Those Under Federal Law

As we stated in our main brief (n. 3, p. 9) the general principles of *respondeat superior* under Washington law are the same as those under federal law:

> The general rule is that a party injured by the negligence of another must seek his remedy against the person who caused the injury, since such person is alone liable. To this general rule the case of master and servant is an exception, and the negligence of the servant, while acting within the scope of his employment, is imputable to the master. But, to bring a case within this exception, it is necessary to show that the relation of master and servant exists between the person at fault and the one sought to be charged for the result of a wrong; and, *the relation must exist at the time, and in respect to the particular transaction,* out of which the injury arises. * * * *An act of the servant not done in the execution of services for which he was engaged cannot be regarded as the act of the master.*[1] [Emphasis added. *Roletto* v. *Department Stores Garage*, 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948).]

---

[1] See n. 1, next page.

It is also well-settled Washington law that to establish the relation of master and servant a plaintiff must prove (1) that the tortious act was related to, or within the "scope" of, the duties assigned to the servant (*i.e.,* that the act was committed while the servant was furthering the interests of his employer), *McGrail* v. *Department of Labor and Industries,* 190 Wash. 272, 277, 67 P. 2d 851, 853 (1937), and (2) that at the time the act was committed the master had full control, or the right to control, the manner and details of the servant's activities. *Leech* v. *Sultan R. & Timber Co.,* 161 Wash. 426, 427, 297 Pac. 203, 204 (1931).[1]

2. The Facts of This Case Do Not Meet the Requirements of the Washington Law of Respondeat Superior for Imposing Liability Upon the United States

In our main brief (pp. 12-21) the facts of this case were analyzed to show why the United States cannot be said to have had sufficient interest in, or the type of supervision and control over, "the particular transaction" in which Sergeant Mayer was engaged at the time of the accident to warrant its being held liable under the doctrine of *respondeat superior,* and we will not now reiterate that analysis. However, in his answering brief, appellee cites a number of cases wherein the Washington courts have held employees to have been acting within the scope of their employment while driving their own cars. These decisions, argues appellee, require affirmance of the judgment

[1] These are the very same standards that we stated to be applicable under federal law. Appellant's brief, pp. 7-8.

below. In fact, none of those decisions are apposite to consideration of this case.

In each of the cases cited by appellee, travel between varying points was an essential part of the assigned duties of the employee concerned. For example, in *Rice* v. *Garl,* 2 Wash. 2d 403, 98 P. 2d 301 (1940), so heavily relied upon by appellee, the employee was a repairman hired to make periodic or emergency repairs upon distributing stations, plants and other properties in various parts of the state. Thus, his work required frequent trips during his regular working hours as a necessary part of the duties for which he was hired; *i.e.,* it was understood to be within the "scope" of his duties or employment that he would be required to travel frequently, either by conveyance provided by the employer or by his personal vehicle. As the court explained in the *Rice* case, it was because of this frequent travel between different points of varying distances required by the employer that the court found inapplicable the usual rule that employees using their own cars to go to work are not acting within the scope of their employment. The court there said, "if the workman's place of employment is subject to frequent and variable changes of substantial distance, his transportation may be of such importance to both himself and his employer that it is made a part of his employment." 2 Wash. 2d at 409.

Similar relationships existed in *Burchfield* v. *Department of Labor and Industries,* 165 Wash. 106, 4 P. 2d 858 (1931) (stevedore hired to work at different

ports);[2] *Buckley* v. *Harkins,* 114 Wash. 468, 167 Pac. 928 (1921) (truck salesman required to visit customers);[3] *Carmin* v. *Port of Seattle,* 10 Wash. 2d 139, 116 P. 2d 338 (1941) (contact man who traveled throughout state); *Dahl* v. *Moore,* 161 Wash. 503, 297 Pac. 218 (1931) (real estate salesman required to show customers various properties); *Femling* v. *Star Publishing Co.,* 195 Wash. 395, 81 P. 2d 293 (1938) (newsboy who delivered papers by bicycle); *Hilding* v. *Department of Labor and Industries,* 162 Wash. 168, 298 Pac. 321 (1931) (lumber grader required to visit sites of lumber); *James* v. *Ellis,* 44 Wash. 2d 599, 269 P. 2d 573 (1954) (roof repairman); *Kludas* v. *Inland-*

---

[2] Despite appellee's insistence to the contrary, cases holding an employee to be within the scope of employment for purposes of workmen's compensation are not suitable as precedents for finding an employee to be within the scope of employment for the purpose of imposing tort liability upon his employer—because of the different considerations involved. As the Washington Supreme Court itself has said:

> This Court is committed to the doctrine that our workmen's compensation act should be liberally construed in favor of its beneficiaries. It is a humane law and founded on sound public policy, and is the result of thoughtful, painstaking and humane considerations; and its beneficent provisions should not be limited or curtailed by a narrow construction. *Hilding* v. *Department of Labor and Industries,* 162 Wash. 168, 175, 298 Pac. 321, 324 (1931).

Also see *N.L.R.B.* v. *Hearst Publications,* 322 U.S. 111 at 122 (1944), where the Supreme Court stated, "within a single jurisdiction a person who, for instance, is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation."

[3] In addition, the facts of the *Buckley* case show that the employee had no license to drive the car as his own "but drove it under the license of and as the property of" his employer. See *Bourus* v. *Hagen,* 192 Wash. 588, 591, 74 P. 2d 205, 207 (1937).

American Printing Co., 149 Wash. 180, 270 Pac. 429 (1928) (deliveryman); *Melosevich* v. *Cichy,* 30 Wash. 2d 702, 193 P. 2d 342 (1948) (pinball machine repairman and inspector); *Morris* v. *Department of Labor and Industries,* 179 Wash. 423, 38 P. 2d 395 (1934) (installer and repairman of electrical equipment); *Thompson* v. *Department of Labor and Industries,* 192 Wash. 501, 73 P. 2d 1320 (1937) (chain meat market supervisor required to inspect various stores); *Wilson* v. *Times Printing Co.,* 158 Wash. 95, 290 Pac. 691 (1930) (newspaper deliveryman), all relied upon by appellee. In every one of the above cases the employee, whether he was deliveryman, salesman, inspector, contact man, or outside repairman, was required —as part of the every-day performance of his duties —to travel varying distances from place to place on "company time." Cf. *Carter* v. *Dep't of Labor and Industries,* 183 Wash. 86, 48 P. 2d 623 (1935).

In the instant case this is not true. Sergeant Mayer's work, either as an ordinary soldier or as the signalman he was, required only his presence at an Army post for the performance of ordinary soldier's or signalman's duties within the limits of the post, and, more specifically with respect to his newly assigned duties, his attendance at the Army Language School for the purpose of learning the Chinese language. The only travel required of him was this single, isolated trip for changing his permanent station; his assigned duties were thus not to commence until after he completed his travel. Appellee has cited no case where a private employer was held liable for the negligence of an employee while driving his own car and while moving his

residence from one city to another for the purpose of commencing a new job at a different branch office of the same employer. The courts of Washington have never imposed liability in such circumstances. On the contrary, it has been held that "An act of the servant not done *in the execution of services for which he was engaged* cannot be regarded as the act of the master." [Emphasis added.] *Roletto* v. *Department Stores Garage,* 30 Wash. 2d 439, 442, 191 P. 2d 875, 877 (1948).

Moreover, as we emphasized in our main brief (pp. 3, 13, 19-20), at the time of the accident here involved Sergeant Mayer was not traveling from his old station to the new one and hence could not have been serving the interests of the United States. He was not, at the time, traveling under that part of his orders requiring a change of station but rather traveling under that part of his orders authorizing him to take leave. Mayer was thus in a leave, not duty, status and was driving his own car on a public highway near his home in Seattle. If he was in fact intending to go to Fort Lewis at that time, the most that could be said is that he was returning from his home to his former duty station. As the Washington courts have repeatedly held, travel between home and work is not within the scope of employment. *Bourus* v. *Hagen,* 192 Wash. 588, 74 P. 2d 205 (1937).

Appellee contends that the travel orders, as interpreted in the testimony of Warrant Officer Cichy, establish incontrovertibly that Mayer's travel was in the Government's interest. But as explained in our main

brief (pp. 20-21) the symbol "TDN" appearing in those orders, although translatable as "travel directed is necessary to comply with the order" (R. 64), is merely a term of art used to satisfy statutory prerequisites for compensating travel. It does not even imply that the payee is an employee of the United States, much less that he is actively serving the Government's interests at the time of his travel or that his travel is within the scope of his assigned duties or employment. Moreover, the travel that was considered "necessary" and for which Mayer was to be reimbursed by the United States was the travel between Fort Lewis and Monterey, not that between Seattle and Fort Lewis. At the time of the accident Mayer was therefore not engaging in compensable travel and hence the part of his orders containing the symbol "TDN" is inapplicable.

Finally, appellee contends that the United States had full control over Sergeant Mayer's activities since he was subject to military discipline and could have been court-martialed had he failed to obey the lawful orders of a superior officer. This is undeniably true. The Government has, at all times, a potential right to control the conduct of members of the armed services *in general,* even when they are engaging in outside work for which they are compensated by another employer. But this is not enough to impose *respondeat superior* liability upon the United States, even if it be assumed that Mayer was acting in furtherance of the Government's interests. For the United States to be held liable, appellee must also have shown that the

United States had the right to control the *particulars* of Mayer's conduct, that the vehicle he was driving and his operation of that vehicle were under the Government's control, or potentially under its control. *Nettleship* v. *Shipman,* 161 Wash. 292, 296 Pac. 1056 (1931). This, appellee failed to establish. Appellee has nowhere shown that the United States could have controlled Mayer's operation of his personally owned property. The admitted facts show the contrary, especially since Mayer was on leave at the time of the accident. See our main brief, pp. 13-15, 18-20.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Government's main brief hitherto filed, we respectfully submit that the judgment below should be reversed.

WARREN E. BURGER,
Assistant Attorney General,

CHARLES P. MORIARTY,
United States Attorney,

PAUL A. SWEENEY,
JULIAN H. SINGMAN,
Attorneys, Department of Justice.

DECEMBER, 1955

☆U. S. GOVERNMENT PRINTING OFFICE 1955—367827/P.O. 677